No. 92-1662

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH STUART GRANDERSON, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent argues at length that his preferred interpretation of 18 U.S.C. 3565(a) (Supp. IV 1992) reflects a more sensible and appropriate response to the problem of drug abuse by probationers than does the interpretation suggested by the plain language of the statute. Respondent has failed to point to any plausible basis for construing the statutory text in the manner he urges, however, and thus his policy arguments are entirely beside the point.

1. Respondent does not seriously dispute the proposition, established in our opening brief (U.S. Br. 12-13), that probation is a sentence for purposes of federal sentencing law. Respondent argues instead (Br. 11-14) that, while probation is a sentence under the Sentencing Reform Act of 1984, the 1984 Act's

departure from prior law "was meant as a semantic change" and thus "probation revocations are still to be treated as breaches of trust." Resp. Br. 12, 13.[1]

However one characterizes probation revocation, the dispositive fact is that, as respondent essentially concedes, federal sentencing law deems probation to be a type of sentence. As a result, there is no basis for accepting respondent's interpretation of the statute, which would exclude probationary sentences from the scope of the phrase "original sentence" as used in Section 3565(a).

2. Respondent's principal contention is that, for purposes of Section 3565(a), his "original sentence" was 0-6 months' imprisonment, the presumptive range of imprisonment established by the Sentencing Guidelines for his offense. That contention must be rejected, because it is inconsistent with any possible meaning of the phrase "original sentence" as that phrase is used in the English language or in criminal law.

a. Respondent asserts (Br. 15-16) that the dictionary definition of the word "original" supports his conclusion that the presumptive range of imprisonment set forth in the Guidelines is the "original sentence" of a defendant who was actually sentenced

[1] Respondent also contends (Br. 13-14) that the 1984 Act's change in the treatment of probation "was not designed to force an increase in probationers' revocation sentences." That claim is irrelevant, because it was the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7303, 102 Stat. 4464, not the 1984 Act, that "force[d] an increase in probationers' revocation sentences" by imposing a mandatory minimum sentence of "one-third of the original sentence."

to a term of probation instead of imprisonment.[2] Because "original" can mean "of or relating to a rise or beginning," "constituting a source," or "constituting the product or model from which copies are made" (Br. 15, quoting *Webster's Third New International Dictionary* 1592 (1986)), respondent concludes that "original sentence" must mean the "source" or "beginning" of the sentencing process—*i.e.*, the presumptive Guidelines imprisonment range, not the "derivative" or "secondary" sentence of probation imposed on a defendant in place of imprisonment.

Respondent's attempt to evade the ordinary meaning of "original sentence" suffers from two fatal flaws. First, the logic of respondent's argument would suggest that the proper benchmark for purposes of Section 3565(a) is the statutory sentencing range prescribed by Congress rather than the Guidelines imprisonment range developed by the Sentencing Commission, because the Guidelines range is

[2] Respondent appears to contend (Br. 35-36) that the sentence he originally received—five years' probation—was in fact drawn from within the presumptive 0-6 month range of imprisonment prescribed by the Guidelines for his crime. It is unclear what support respondent draws from that contention, but in any event it is incorrect. Under federal sentencing law, as respondent concedes elsewhere (Br. 24), probation and imprisonment are mutually exclusive sentences. See 18 U.S.C. 3561(a)(3); Guidelines §§ 5B1.1(b)(3), 5C1.1. Thus, while a sentence of zero months' imprisonment is theoretically possible when the Guidelines prescribe a presumptive 0-6 month imprisonment range, that is not the sentence that was actually imposed on respondent in this case. Respondent received a sentence of probation, which necessarily means that he did not receive a sentence of imprisonment at all, let alone a sentence of imprisonment from within the presumptive Guidelines imprisonment range.

"derivative" of and "secondary" to the "original" statutory sentencing range. For obvious reasons, respondent prefers that his sentence upon revocation be determined by reference to the shorter Guidelines range, but he fails to explain why his interpretation of the word "original" does not point instead to the range prescribed by statute—in this case, a term of imprisonment of "not more than five years." 18 U.S.C. 1703(a).

b. Second, and more fundamentally, respondent's reasoning ignores the second word of the very phrase he purports to construe. Even if it could plausibly be said that the Guidelines imprisonment range (and not the statutory imprisonment range) is the "original" sentencing range applicable to a defendant, it would not follow that the Guidelines imprisonment range is the defendant's "original *sentence*," because that range is simply not the defendant's *sentence* at all.

As used in the criminal law, the word "sentence" means "[t]he judgment formally pronounced by the court or judge upon the defendant after his conviction in a criminal prosecution, imposing the punishment to be inflicted, usually in the form of a fine, incarceration, or probation," or a "[j]udgment of [a] court formally advising [the] accused of [the] legal consequences of guilt." *Black's Law Dictionary* 1362 (6th ed. 1990). Thus, the word "sentence" means the punishment imposed on a defendant for his crime.[3] It

[3] Respondent errs in contending (Br. 18 & n.3) that our interpretation of Section 3565(a) rests upon inconsistent definitions of the word "sentence." To the contrary, it is his preferred construction that rests on different definitions of the word: in respondent's view, "sentence" sometimes carries its dictionary meaning, but at other times it means the range of

does not mean—unless accompanied by modifying words such as "potential," "available," or "possible" —the range of alternative punishments that could have been, but were not, imposed on a defendant instead.[4]

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punishments that could have been imposed but were not. Under our construction of the statute, by contrast, the meaning of the word "sentence" is consistent: as a noun, it means the judgment of the court setting forth the punishment to be imposed on a defendant; as a verb, it means to impose a sentence. Either as a noun or a verb, of course, "sentence" can refer to a term of probation or a term of imprisonment; whether one or the other of those types of sentence is being referred to depends on the context in which the word is used.

[4] Federal sentencing law consistently uses the word "sentence" to refer to the punishment that was actually imposed on a defendant. See, *e.g.*, 18 U.S.C. 3551(b) and (c), 3553(a), (b), (c), and (e), 3554, 3555, 3556, 3557, 3558, 3562(b) (Supp. IV 1992), 3563(a) (Supp. IV 1992), (b) (Supp. IV 1992), (c), and (d), 3564(a) and (e), 3565 (Supp. IV 1992), 3566; Guidelines § 5C1.1. Respondent errs in suggesting (Br. 30) that 18 U.S.C. 3742 (Supp. IV 1992) is to the contrary. That provision authorizes an appeal if a defendant's sentence "is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range." 18 U.S.C. 3742(a)(3); see also 18 U.S.C. 3742(b)(3) (analogous provision for sentences below Guidelines range). The ordinary meaning of the word "sentence" is plainly modified by the context in which the word first appears in Section 3742(a)(3), because the phrase "the sentence specified in the applicable guideline range" necessarily refers to the maximum sentence that could have been imposed under the Guidelines instead of the sentence that was actually imposed. The phrase "original sentence," by contrast, is not modified by any word or phrase such as "available," "potential," or "specified in the applicable guideline range," and thus it cannot be construed as if it were so modified.

As we argue in our opening brief (U.S. Br. 15-17), and as respondent appears to acknowledge (Resp. Br. 15-16 & n.2), the word "original" simply does not mean "available" or its equivalent.[5] Thus, the phrase "original sentence" cannot be construed to mean the range of available, potential, or possible sentences that could have been, but were not, imposed on the defendant. Instead, it must mean the "beginning" or "initial" "judgment * * * imposing the punishment to be inflicted"—in this case, the original sentence of five years' probation.[6]

3. For the foregoing reasons, in cases in which the defendant receives a sentence of probation at his or her initial sentencing, the phrase "original sentence" must be understood to refer to that sentence of probation. Therefore, it follows logically from the text and structure of Section 3565(a) that a defendant

[5] For that reason, respondent plainly errs in suggesting (Br. 18-20, 31) that "original sentence" is nothing more than Congress's shorthand reference to "any other sentence that was *available* under subchapter A at the time of the initial sentencing." 18 U.S.C. 3565(a)(2) and (b) (emphasis added).

[6] Respondent contends (Br. 16) that the other statutes in which Congress has used the phrase "original sentence" are inconsistent with our interpretation of that phrase because those statutes do not contemplate that "probation is now to be its exclusive meaning." That probation is not always a defendant's "original sentence" in those statutes, however, is completely irrelevant. The crucial point—and one that respondent does not even attempt to refute—is that Congress has always used the phrase "original sentence" to refer to the sentence that was actually imposed on a defendant, not the range of possible sentences that could have been imposed instead. See U.S. Br. 19-20, citing 10 U.S.C. 863; 18 U.S.C. 4214(d)(4); Fed. R. Crim. P. 35(a)(2). Respondent offers no basis for concluding that Congress meant the phrase to have a different meaning in Section 3565(a).

whose probation is revoked for possession of illegal drugs must receive a sentence of imprisonment that is at least one-third as long as the "original sentence" of probation. Respondent has failed to identify any persuasive argument to the contrary.

a. Respondent criticizes (Br. 17-18, 26 & n.5) our contention that the phrase "not less than one-third of the original sentence" in Section 3565(a) refers to the length, not the type, of the sentence originally imposed on the defendant.[7] It is certainly possible, however, to read that phrase in the manner we urge. If anything, that is the more natural reading of the phrase, because the words "not less than one-third" necessarily contemplate a quantity, not a type, of whatever happens to be their object.

To be sure, that is not the only possible way to read the phrase at issue. Read in isolation, it could mean either (1) not less than one-third of the length of the original sentence (in this case, 20 months), or (2) not less than one-third of the length *and* the type of the original sentence (in this case, 20 months *of probation*). The latter interpretation must be rejected, however, because it would lead to the conclusion that probationers who possess illegal drugs are to be rewarded for that conduct by imposition of a new

[7] Respondent mischaracterizes our argument in contending (Br. 17) that we read the phrase "original sentence" itself to refer "only to the *length*, and not the *type*," of sentence originally imposed on a defendant. The phrase "original sentence," as applied to a defendant who originally received a sentence of probation, naturally refers both to the length and the type of the sentence. Read against the backdrop of the sentencing scheme established by Section 3565(a), however, the phrase "*not less than one-third of* the original sentence" plainly refers to the *length* of the original sentence, not its type.

sentence of probation that is only one-third as long as their original sentence of probation.

That result would be absurd and plainly inconsistent with Congress's evident purpose in adopting the provision at issue in this case.[8] Indeed, respondent concedes as much, asserting that construing Section 3565(a) to permit imposition of a new, shorter sentence of probation on defendants who have possessed illegal drugs would be "an absurd result." Resp. Br. 6, 17. Statutes must be construed, where possible, to avoid absurd consequences. *Rowland* v. *California Men's Colony*, 113 S. Ct. 716, 720 (1993); *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). That canon of construction can be satisfied in this case only by adopting the interpretation we urge, which avoids the patent absurdity of rewarding drug possession while still giving effect to the plain meaning of the statutory text.

Moreover, as we discuss in our opening brief (U.S. Br. 14-15), the conclusion that the last sentence

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[8] Respondent argues at length (Br. 38-45) that the legislative history of the Anti-Drug Abuse Act of 1988 demonstrates congressional desire to follow a "measured" approach to the problems of drug possession and use in this country. Respondent nowhere identifies any indication, however, that Congress intended to treat persons who possess drugs with particular *leniency* or to encourage such conduct by making possible a reduction in the sentence otherwise being served by such persons. Rather, respondent's discussion of the 1988 Act makes clear that Congress consistently enhanced the potential punishments and other adverse consequences applicable to persons who use, possess, or traffic in illegal drugs. For that reason, it would be inconsistent with every available indication of congressional intent to construe Section 3565(a) in a manner that permits imposition of a new and shorter sentence of probation.

of Section 3565(a) requires courts to impose a sentence of imprisonment upon revocation is also compelled by the structure of Section 3565(a). The overall plan of that subsection demonstrates that probation is never a possible sentence once a defendant's probation has been revoked, because the consequence of revocation is that some "other" sentence must be imposed instead. 18 U.S.C. 3565(a)(2). Indeed, respondent agrees with that conclusion. He notes (Br. 19) that when a defendant violates the conditions of probation, Section 3565(a) usually permits the court to choose between either (a) continuing the defendant's probation or (b) revoking probation and imposing a different sentence, but that "[t]he final sentence of § 3565(a) * * * clarifies that courts do not have such discretion when a defendant possesses drugs on probation." In short, probation is no longer a permissible option under Section 3565(a) once the original sentence of probation has been revoked, and thus it is indisputable that the mandatory sentence of "not less than one-third of the original sentence" refers to a sentence of imprisonment.[9]

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[9] Respondent asserts (Br. 18) that "the 'length' of the Government's 'original sentence' is unclear" because "[a] 'fine' also is described in the 1984 [Sentencing Reform] Act as a 'sentence.'" The fact that a fine is also a sentence under federal sentencing law creates no ambiguity in our interpretation of Section 3565(a). When the "original sentence" includes a sentence of probation—as is always the case under the provision at issue here—it is impossible to read Section 3565(a) to require imposition of a *fine* that is "not less than one-third of" the original sentence of probation. Probation, like imprisonment, is measured in months, whereas fines are measured in dollars, so there is no difficulty in determining whether imprisonment or a fine is to be imposed in lieu of the probationary term originally imposed. The phrase "not less than one-third of the

b. Respondent appears to take the position that the phrase "not less than one-third of the original sentence" refers to the full range of potential imprisonment terms indicated by the Guidelines.[10] As we indicate in our opening brief (U.S. Br. 20-21), the obvious implication of that position is that the mandatory minimum sentence for probationers who possess drugs is one-third of the minimum sentence prescribed by the Guidelines. Because the Guidelines range applicable to defendants who are placed on probation is typically 0-6 months' imprisonment, respondent's position leads to the absurd result that Section 3565(a) permits those defendants to possess drugs while on probation and then receive a sentence of *zero* months' imprisonment in lieu of their preexisting sentence of probation.

Implicitly recognizing the absurdity of that result, the courts of appeals that agree with respondent's interpretation of "original sentence" have simply ignored the logical consequences of their reasoning and, without any attempt to explain or justify their approach, have looked exclusively to the maximum presumptive Guidelines sentence in determining the minimum sentence under Section 3565(a). See U.S. Br. 21. While not expressly adopting that approach as his own, respondent attempts (Br. 32-33) to defend it. According to respondent, apparently, "original sentence" means "any other sentence that was available" at the time of initial sentencing, and the phrase "any other sentence that was available" can be construed to mean "the maximum sentence that was available."[11]

Even if "any other sentence that was available" were a possible meaning of "original sentence," the next step of respondent's argument—that the former phrase can be read to refer exclusively to the maximum available sentence—would not follow. Under 18

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original sentence," when applied to a sentence of probation, necessarily yields a minimum quantity of months, and the only way to sentence a defendant to a term of months is to impose a sentence of imprisonment.

[10] See, *e.g.*, Resp. Br. 20 (mandatory minimum sentence of "not less than one-third of * * * a defendant's established guideline *range*") (emphasis added); *id.* at 31 ("Mr. Granderson's 'original sentence' meant his guidelines *range*.") (emphasis added). It is, at best, unusual to speak of a fraction of a *range* of numbers, which is another reason for rejecting respondent's interpretation of the phrase "original sentence." See U.S. Br. 20. Respondent suggests (Br. 31), however, that our interpretation of the statute suffers from a similar flaw, because "[a] term of probation * * * is not static." The fact that a court may revise the term of probation applicable to a particular defendant or impose conditions that must be satisfied during some or all of that term does not undermine the certainty provided by our interpretation of Section 3565(a), because at any given time a defendant's "original sentence" of probation will always be expressed as a discrete term of months rather than as a range. The same cannot be said of respondent's preferred construction of the statute.

[11] As noted in our opening brief (U.S. Br. 22), the logic of that interpretation suggests that the appropriate benchmark for determining the minimum sentence under Section 3565(a) should be the maximum *statutory* sentence, since that is the true "maximum available sentence" at the initial sentencing hearing. Respondent mistakenly characterizes that point as our "fall-back position." Br. 37. We do not suggest that that is a possible interpretation of the statute; to the contrary, it is plainly impermissible, because it rests on the same flawed interpretation of "original sentence" as does respondent's construction of the statute. The point is simply that respondent repeatedly ignores the logical implications of his arguments in order to achieve his desired result.

U.S.C. 3565(a)(2), when a court revokes the defendant's probation and imposes "any other sentence that was available * * * at the time of the initial sentencing," the court is not limited to the *maximum* initially available sentence; rather, as the language of the statute plainly indicates, the court can impose "*any*" sentence from within the initially available range.[12] Indeed, respondent elsewhere agrees with that reading of Section 3565(a)(2) (see Br. 19), so it is impossible to understand the basis for his conclusion that the same provision can be read to refer only to the maximum available sentence when it is incorporated by reference in the phrase "original sentence."

Thus, respondent's claim that the phrase "original sentence" refers to the Guidelines presumptive imprisonment range leads either to an absurd result (*i.e.*, no minimum sentence at all for the largest category of probationers who possess illegal drugs) or to a glaring internal inconsistency (*i.e.*, rejection of the implications of respondent's position by treating "original sentence" as the *maximum* Guidelines sentence rather than the Guidelines range). Either result would be sufficient reason for rejecting respondent's interpretation even if the phrase "original sentence" could otherwise plausibly be read to mean an "initially available but rejected sentence."

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[12] See, *e.g.*, *United States* v. *Boyd*, 961 F.2d 434, 438 (3d Cir.), cert. denied, 113 S. Ct. 233 (1992); *United States* v. *Alli*, 929 F.2d 995, 997-998 (4th Cir. 1991); *United States* v. *Williams*, 961 F.2d 1185, 1187 (5th Cir. 1992); *United States* v. *Von Washington*, 915 F.2d 390, 391 (8th Cir. 1990); *United States* v. *Dixon*, 952 F.2d 260, 261-262 (9th Cir. 1991); *United States* v. *Maltais*, 961 F.2d 1485, 1486-1487 (10th Cir. 1992); *United States* v. *Smith*, 907 F.2d 133, 135-136 (11th Cir. 1990).

c. Respondent contends (Br. 21-28) that his interpretation of Section 3565(a) draws support from Congress's treatment of persons who possess drugs while on supervised release, as set forth in 18 U.S.C. 3583(g).[13] According to respondent, Congress's failure to use identical language in Sections 3583(g) and 3565(a) demonstrates that those provisions were intended to dictate dramatically different responses to the problem of convicted criminals who possess illegal drugs while enjoying the benefits of conditional release.[14] That contention is without merit.

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[13] Respondent also relies on Congress's treatment of defendants who possess drugs while on parole. See Resp. Br. 28-30 (citing 1988 Act § 7303(c), codified at 18 U.S.C. 4214(f)). Congress's treatment of parolees sheds no light on the meaning of Section 3565(a), however, because the parole provision—unlike Sections 3583(g) and Section 3565(a)—does not include any language imposing a mandatory minimum sentence.

[14] Respondent also contends (Br. 23-25, 27-28) that defendants who possess drugs while on probation should be treated more leniently than defendants who possess drugs while on supervised release because members of the former group have usually committed the more serious crimes and have already served a term of imprisonment. Respondent's policy preferences are beside the point, however, because they shed no light on Congress's intent in adopting the statute. Congress could just as easily have determined to punish particularly severely those defendants who are extended special leniency and trust in the form of a sentence of probation and who then breach that trust by possessing illegal drugs.

We note, moreover, that respondent is simply wrong in asserting (Br. 27) that, while supervised release terms vary according to the severity of the underlying offense, "[n]o such gradations exist for probation." The authorized terms of probation vary depending on whether the underlying offense is a felony (one to five years), a misdemeanor (not more than five years), or an infraction (not more than one year). 18 U.S.C. 3561(b). Moreover, defendants whose offenses are sufficiently

Respondent points to two differences between Sections 3583(g) and 3565(a) that, in his view, require that the provisions be interpreted to achieve different results. First, Section 3583(g) requires imposition of a sentence that is "not less than one-third of the *term of supervised release*," whereas Section 3565(a) requires imposition of a sentence that is "not less than one-third of the *original sentence*." As we explain in our opening brief (U.S. Br. 27-28), however, Congress could not have used the phrase "original sentence" in lieu of "term of supervised release" in Section 3583(a). A term of supervised release, unlike a sentence of probation, is always imposed as "part of" a sentence of imprisonment (18 U.S.C. 3583(a)), and thus it would have been unclear whether the phrase "original sentence" in Section 3583(g) was intended to refer to the term of imprisonment, the term of supervised release, or both.

Respondent does not seriously dispute that point.[15] Instead, he argues (Br. 22) that we failed to explain

minor that their Guidelines offense level is less than 6 may receive no more than three years' probation, whereas defendants whose offense level is 6 or greater must receive at least one year's probation. Guidelines § 5B1.2(a).

[15] Respondent does contend (Br. 22) that "[p]robation * * * also is often only 'part of' a sentence initially imposed, since the sentence imposed may include a fine." That contention is incorrect. While both probation and a fine may be imposed on the same defendant, they remain separate sentences. See 18 U.S.C. 3551(b) ("A sentence to pay a fine may be imposed in addition to any *other sentence*" such as probation) (emphasis added); Guidelines, ch. 5, pt. B, Introductory Commentary (probation is "a sentence in and of itself"). Supervised release, on the other hand, is not a sentence in its own right, but is merely "part of" a sentence of imprisonment. 18 U.S.C. 3583(a); see also 18 U.S.C. 3551(b) (describing sentences that

why Congress chose not to tailor the language of Section 3565(a) more closely to the language used in Section 3583(g). The reason, however, should be obvious. Section 3583(g) had to use the phrase "supervised release" in order to make its meaning clear. Section 3565(a), of course, could not use that phrase, because it deals with probation instead. Thus, Congress had to select a different phrase, and the one it chose—"original sentence"—necessarily refers to the sentence of probation that was initially imposed on the defendant after his conviction.

The second difference between Sections 3565(a) and 3583(g) on which respondent relies (Br. 23, 26 & n.5) is that Section 3565(a) does not expressly provide that the defendant must be sentenced to serve at least one-third of the previous sentence "in prison." Again, however, that difference is explained by the statutory schemes at issue.

As we have demonstrated (see pp. 7-9, *supra*; U.S. Br. 14-15), and as respondent concedes (Br. 19), Section 3565(a) makes clear that a new sentence of probation is never an option once a defendant's previous sentence of probation has been revoked.[16] Thus,

may be imposed on individuals as "a term of probation," "a fine," and "a term of imprisonment").

[16] Given respondent's agreement (Br. 19) that probation is never an option once a previous sentence of probation has been revoked, it is difficult to understand the basis for his argument that the government's interpretation of Section 3565(a) should be rejected because that provision does not contain the "in prison" language included in Section 3583(g). After all, if that were a valid criticism, it could be directed with equal force against respondent's preferred construction of the statute, because he takes the position that Section 3565(a) requires imposition of a sentence from within the Guidelines' presumptive *imprisonment* range rather than a new sentence of probation.

there is no need for Section 3565(a) to specify the type of sentence to be imposed on defendants for "not less than one-third of the original sentence"; imprisonment is the only remaining option.[17]

Section 3583(g) requires the court to "terminate" the supervised release of a defendant who possesses illegal drugs. Normally, however, no sentence of imprisonment follows the "terminat[ion]" of supervised release; instead, the defendant is simply released from any further supervision. 18 U.S.C. 3583(e)(1). It was therefore necessary for Congress to make clear that a term of imprisonment was to follow termination of supervised release for drug possession; unlike in the probation context, where continuation on probation can never follow revocation (compare 18 U.S.C. 3565(a)(1) with 18 U.S.C. 3565(a)(2)), congressional silence on the type of sentence required by Section 3583(g) would have left courts free to reimpose a new term of supervised release, thereby frustrating Congress's purpose. Accordingly, Congress added the phrase "in prison" to Section 3583(g) because it was necessary to make the legislative intention plain. Congress left that phrase out of Section 3565(a), where the same result was implicit in the statutory scheme.[18]

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[17] Supervised release is not a valid alternative way of satisfying the minimum term required by Section 3565(a), because supervised release can be imposed only as part of a sentence of imprisonment (18 U.S.C. 3583(a)), and defendants on probation have by definition not yet received such a sentence. 18 U.S.C. 3561(a)(3).

[18] Respondent also contends (Br. 34-35) that his interpretation of Section 3565(a) draws support from Chapter 7 of the Sentencing Guidelines, which addresses the subject of probation revocation. As respondent concedes, however, even the provisions of Chapter 7 suggest a minimum sentence (3-9 months' imprisonment) that is more severe than the minimum sentence required under his interpretation of Section 3565(a). More importantly, Chapter 7 of the Guidelines was not promulgated by the Sentencing Commission until November 1, 1990, two years *after* adoption of the statutory provision at issue in this case, and thus it is inconceivable that Congress could have intended Section 3565(a) to be construed in light of the provisions of Chapter 7. In any event, Chapter 7 is merely a set of advisory policy statements issued by the Commission without submission to Congress (see, *e.g.*, *United States* v. *Thompson*, 976 F.2d 1380, 1381 (11th Cir. 1992) (per curiam); Guidelines Manual, ch. 7, pt. A(3)(a), at 322 (Nov. 1, 1993)), and it expressly contemplates that statutory mandatory minimum sentences such as that set forth in Section 3565(a) will take precedence over the imprisonment range suggested by the Guidelines. See Guidelines § 7B1.4(b)(2) (policy statement) ("Where the minimum term of imprisonment required by statute * * * is greater than the maximum of the applicable range, the minimum term of imprisonment required by statute shall be substituted for the applicable range."); *id.*, Application Note 5 (noting that Section 3565(a) imposes mandatory minimum sentence for drug possession).

d. Respondent also contends (Br. 33-34) that our interpretation of Section 3565(a) should be rejected because, in the case of defendants convicted only of misdemeanors, it could in theory result in a sentence upon revocation that is longer than the statutory maximum sentence applicable to the underlying offense. That contention is without merit.

In the first place, the sentence mandated by Section 3565(a) is itself part of the statutory maximum sentence applicable to the underlying offense. When a defendant is convicted of a misdemeanor, it is always possible that the defendant will be sentenced to a term of supervised release or probation that carries with it the possibility of additional incarceration upon revocation, and that additional term of incarceration may

well exceed the length of the term of imprisonment that could have been imposed for the offense at the initial sentencing hearing.

For example, a defendant convicted of a Class A misdemeanor (see 18 U.S.C. 3581(b)(6)) and sentenced to 12 months' imprisonment to be followed by 12 months' supervised release would, upon revocation of supervised release, face the possibility of serving an additional 12 months in prison (for a total of 24 months), even though the maximum term of imprisonment available at the initial sentencing hearing was only 12 months. See 18 U.S.C. 3583(e)(3) (Supp. IV 1992) (court may "revoke a term of supervised release, and require the person to serve in prison *all or part* of the term of supervised release") (emphasis added). If termination of the defendant's supervised release resulted from drug possession, moreover, Section 3583(g) would *require* at least four months' imprisonment in addition to the 12 months previously served.

Thus, Section 3565(a) is hardly unique in creating the possibility that the amount of time a defendant spends in prison may ultimately exceed the maximum term of imprisonment that could have been imposed at the defendant's initial sentencing hearing. Contrary to respondent's suggestion (Br. 34, citing *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986)), that possibility should not be deemed to undermine the constitutionality of the sentencing scheme created by Congress. The fact that the maximum punishment possible for a defendant cannot be imposed at the initial sentencing hearing and depends upon the defendant's post-conviction conduct does not change the fact that Congress expressly authorized that maximum punishment even for misdemeanors.

In any event, any purported constitutional infirmity in Section 3565(a), as applied to misdemeanor sentences, would not provide a proper basis for rejecting our interpretation of that statute. No such claim of unconstitutionality can be made in this case, because respondent was convicted of a felony punishable by five years' imprisonment followed by a three-year term of supervised release. 18 U.S.C. 1703(a), 3581(b)(4), 3583(b)(2). Moreover, the fact that Section 3583(g) creates the same possibility of an allegedly unconstitutional sentence eliminates any basis for the claim that Congress cannot be deemed to have intended that result in Section 3565(a).

e. Finally, respondent argues that a variety of policy reasons support his proposed construction of Section 3565(a). First, respondent asserts that the length of a defendant's sentence of probation is a bad "barometer" for determining the appropriate punishment upon revocation (Br. 32), and that Section 3565(a) should not be construed to impose longer terms of imprisonment on probationers who possess drugs than would be imposed if they had been convicted of simple possession instead (Br. 34). Those concerns do not, however, undermine the validity of our interpretation of Section 3565(a). Similar objections could be leveled against Section 3583(g), but Congress was obviously untroubled by those concerns in the supervised release context. There is no reason to believe it had a different view with respect to probation.

Second, respondent asserts (Br. 33) that Section 3565(a) should not be construed in a manner that results in harsher sentences for probationers who possess drugs than Section 3565(b) mandates for probationers who possess firearms. That same result

follows from Section 3583, however, which contains no mandatory revocation provision for possession of firearms, but requires imposition of a mandatory minimum term of imprisonment on defendants who possess drugs while on supervised release. The purported anomaly identified by respondent is explained by the fact that the Anti-Drug Abuse Act of 1988 was primarily aimed at discouraging the use and possession of drugs, not firearms. See U.S. Br. 23-26.[19] Thus, it is hardly surprising that Congress chose to enact provisions requiring substantial mandatory minimum sentences of imprisonment in cases of drug possession.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

NOVEMBER 1993

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[19] Moreover, even the court of appeals' interpretation of Secton 3565(a) yields a minimum sentence that is greater than the minimum sentence for firearms possession under Section 3565(b).

APPENDIX

STATUTES INVOLVED

18 U.S.C.:

§ 3551. **Authorized sentences**

* * * * *

(b) **Individuals.**—An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to—

(1) a term of probation as authorized by subchapter B [18 U.S.C. 3561-3566];

(2) a fine as authorized by subchapter C [18 U.S.C. 3571-3574];

(3) a term of imprisonment as authorized by subchapter D [18 U.S.C. 3581-3586].

A sentence to pay a fine may be imposed in addition to any other sentence. * * *

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§ 3561. **Sentence of Probation**

(a) **In general.**—A defendant who has been found guilty of an offense may be sentenced to a term of probation unless—

* * * * *

(3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense.

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